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JAMES O'KEEFE III

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUAN CARLOS VERA, an
individual,

Plaintiff,

v.

JAMES O'KEEFE III, an individual,
HANNAH GILES, an individual, and
DOES 1-20 inclusive,

Defendants.

Case No. CV 10-1422-L-MDD
Hon. M. James Lorenz

**DEFENDANT JAMES O'KEEFE
III'S REPLY RE HIS OBJECTIONS
TO THE ORDER OF U.S.
MAGISTRATE JUDGE
MITCHELL DEMBIN ENTERED
ON SEPTEMBER 23, 2011 (DOC.
NO. 43)**

Date: November 21, 2011

Time: 10:00 a.m.

Room: 14

Judge: Honorable M. James Lorenz

Pursuant to Federal Rule of Civil Procedure 72(a) and 28 U.S.C. § 636(b)(1),
defendant James O'Keefe III, by and through his attorneys, submits the following
reply on his objections to the order of U.S. Magistrate Judge Mitchell Dembin,

1 entered on September 23, 2011, relating to the parties' joint motion for
2 determination of discovery disputes ("Order").

3 In the Order, Magistrate Judge Dembin ordered defendant O'Keefe to
4 respond to plaintiff's Interrogatory No. 4, in which plaintiff requested that
5 defendant O'Keefe list all media he had published, though the magistrate judge
6 limited the interrogatory to the production of "a list, to the extent that it exists, of
7 his publications related to the nonconsensual taping or recording of others" and
8 "[c]opies of such publications, if within the Defendant's custody, possession or
9 subject to his control." Order at 3, 12. Apparently agreeing with plaintiff's
10 argument in the joint motion that whether defendant O'Keefe was a journalist was a
11 relevant issue (Doc. No. 42 at 2, Order at 3), the magistrate judge concluded that
12 plaintiff was entitled to the information requested because of its marginal relevance
13 to defendant O'Keefe's asserted affirmative defense "based upon his First
14 Amendment rights including freedom of the press." Order at 3.

15 In his objection, defendant O'Keefe pointed out that the First Amendment
16 gives no special protection to journalists, credentialed or otherwise, and that
17 therefore his status as a journalist, or lack thereof, was irrelevant to his First
18 Amendment defense. Doc. No. 46 at 3. *See, e.g., Branzburg v. Hayes*, 408 U.S.
19 665, 704-705 (1972).

20 In his opposition, plaintiff quotes a statement in defendant O'Keefe's motion
21 to dismiss on First Amendment grounds -- viz., that "journalistic enterprise"
22 involving hidden recording of misconduct, when that misconduct is of public
23 concern, "may be essential to serve core First Amendment values" (Doc. No. 22-1
24 at 17) -- as proof that in this motion, defendant O'Keefe claimed to be a journalist.
25 Doc. No. 55 ("Pl's Opp.") at 1-2. Of course, the statement shows nothing of the
26 kind; defendant O'Keefe was making only a facial overbreadth challenge in his
27 motion to dismiss, and was describing the chilling effect of California Penal Code
28 § 632 on one kind of journalistic activity -- as he surely could do whether or not he

1 was, or claimed to be, a “journalist” himself. (Likewise, defendant O’Keefe
2 described how this law chilled motorists’ First Amendment right to record a police
3 officer at an ordinary traffic stop (Doc. No. 22-1 at 3-11), though he did not claim
4 that plaintiff was a police officer whom he recorded at a traffic stop.) More
5 importantly, as reflected in the motion to dismiss, what matters for First
6 Amendment overbreadth purposes is not whether the activity the statute chills is
7 “journalistic,” but whether it is *newsgathering* activity, which, of course, journalists
8 and non-journalists may engage in with equal constitutional protection. Doc. No.
9 22-1 at 14-17. In short, the use of the word “journalistic” in defendant O’Keefe’s
10 motion to dismiss shows neither that one’s status as a “journalist” is relevant to a
11 First Amendment defense under this statute nor that defendant O’Keefe is or is not,
12 or claims to be, a journalist.

13 The magistrate judge also ordered defendant O’Keefe to respond to
14 plaintiff’s Interrogatory No. 10 and Request for Production No. 6, in which plaintiff
15 respectively sought the disclosure of payments defendant O’Keefe received from
16 Andrew Breitbart and the production of correspondence between defendant
17 O’Keefe and Breitbart, though the magistrate judge limited the disclosure to
18 payments that “pertains (sic) to the video recording of Plaintiff” and the production
19 to communications that “pertain to Plaintiff or to the video recording of Plaintiff.”
20 Order at 4, 6, 12. The magistrate judge concluded that such payments and
21 correspondence might be relevant to defendant O’Keefe’s intent to record plaintiff.
22 Order at 4, 6.

23 In his objection, defendant O’Keefe pointed out that whether he intended to
24 record plaintiff is not a disputed issue in this case. Doc. No. 46 at 4. *See, e.g., T.*
25 *Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co., Inc.*, 174 F.R.D. 38, 43
26 (S.D.N.Y. 1997) (noting that one purpose of the issue-limiting role of requests to
27 admit is to limit the need for discovery) (citing 7 James Wm. Moore, et al., *Moore’s*
28 *Federal Practice* § 36.02, at 36-8 to 36-9 (Matthew Bender 3d ed.1997)). Plaintiff

1 makes no mention of this point in his opposition, nor does he attempt to defend the
2 Order's rationale that payments would be relevant to "intent." Rather, he merely
3 asserts that "[p]laintiff has the right to determine who else, if anyone, planned,
4 supported or was involved in the commission of this tort." Pl's Opp. at 2. But he
5 fails to explain how a request for *any* payment related to the video recording of
6 plaintiff, *regardless of when it took place*, seeks matter reasonably calculated to
7 lead to admissible evidence about the planning, support, or commission of the
8 alleged tort. If plaintiff's assertion is the purported rationale for the request, it is
9 flagrantly overbroad.

10 It is noteworthy in this connection, moreover, that plaintiff makes allegations
11 in his complaint only against defendants O'Keefe and Giles, and the deadline for
12 amending his pleadings has long since passed. Doc. No. 41 at 1 (setting deadline
13 for amending pleadings at August 1, 2011). Nor, of course, does plaintiff perform
14 the impossible task of explaining how the supposed actions of others relate to the
15 narrow (and disputed) issues in this case -- most specifically, whether plaintiff had
16 a reasonable expectation of privacy when he was recorded.

17 CONCLUSION

18 For these reasons, defendant O'Keefe's objections to the magistrate judge's
19 order should be sustained.

1 Dated: November 4, 2011

Respectfully submitted,

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3 By /s/ Christopher J. Hajec

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